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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

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August 19, 1950.

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BRIEF OF RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals (R. 9448) is reported in 181 F. 2d 70. No opinion was filed by the District Court in which the case was tried.

JURISDICTION.

The petition seeks the exercise of jurisdiction under the provision of the Judicial Code which confers upon this Court discretion to review by writ of certiorari "any civil or criminal case, before or after rendition of judgment or decree" (U. S. C., Tit. 28, Sec. 1254, par. 1; 62 Stat. 928). None of the reasons specified in Rule 38 of this Court as justifying the granting of a writ is here present.

QUESTIONS PRESENTED.

The basic question is whether the recovery of money in this private suit under the Clayton Act should stand or a new trial should be ordered. The court below, although expressly refraining from comment upon certain of defendants' assignments of error,* predicated its reversal on several grounds. The principal questions presented are

* The court stated: "Our study of the record has disclosed, in addition to what we deem major errors which we have discussed in some detail, other errors stemming from what we have held were the erroneous rulings as to financing and hearsay. The general effect of these also was to unduly hamper the presentation of the defense." (Opinion below, R. 9466.) Other questions presented which were not expressly passed upon are whether the trial court erred in (1) excluding evidence of plaintiff's undercapitalization, another reason specified for termination of the franchises; (2) admitting evidence of profits of other dealerships without regard to their comparability; (3) excluding evidence of customer mistreatment offered to disprove claimed good will; (4) granting leave to amend complaint and denying leave to amend answer; (5) refusing to discharge the jury and coercing a verdict; and (6) awarding exorbitant counsel fees. A complete statement of trial court errors appears in the record (R. 9150). See also Brief for Appellant in the Court of Appeals.

therefore whether the Court of Appeals erred in ruling that the trial judge committed prejudicial error

(1) In permitting the conspiracy indictment in the antecedent criminal case to go to the jury as evidence of all acts therein charged, and instructing the jury (and permitting argument by plaintiffs' counsel) to the effect that the judgment was evidence not only of such acts but also that plaintiff's franchises were cancelled pursuant to the conspiracy charged (Opinion below, R. 9451 to 9459); and

(2) In excluding, because of a misconception of the opinion of the Court of Appeals in the prior criminal case, evidence as to one of the grounds for the cancellation of plaintiff's franchises, namely, the excessive and fraudulent finance "packing" which created ill will toward defendants, and in permitting plaintiffs' counsel to argue to the jury, because such evidence had been excluded, that there was no evidence to support that alleged ground for cancellation (Opinion below, R. 9459 to 9465); and

(3) In excluding evidence as to another of the grounds for cancellation of plaintiff's franchises, namely, customers' dissatisfaction with plaintiff's service, and in particular in excluding as hearsay complaint letters received and acted upon by defendants (Opinion below, R. 9465-9466); and

(4) In excluding testimony of other auto dealers, including the dealers who succeeded plaintiff, that they owned private finance companies and used General Motors Acceptance Corporation (called GMAC) either not at all or to a very limited extent (Opinion below, R. 9466-9467); and

(5) In instructing the jury as to damages and admitting evidence as to damages, which was based on subjective speculation and magnified through errors of law, and was so conjectural and speculative as to leave the verdicts without support (Opinion below, R. 9467-9468).

The petition to this Court attempts to create apprehen-

sion that the opinion of the Court of Appeals may in the future be misconstrued and misapplied in this or in other proceedings. Such a possibility cannot fairly be anticipated. The opinion deals primarily with procedural matters peculiar to the conduct of jury trials.

STATUTES INVOLVED.

Section 4 of the Clayton Act (38 Stat. 731, U. S. C., Tit. 15, Sec. 15).

Section 5 of the Clayton Act (38 Stat. 731, U. S. C., Tit. 15, Sec. 16).

STATEMENT OF THE CASE.

This statement is deemed necessary to correct the inaccuracies and omissions in the petitioners' statement. Only so much of the record will be summarized as is needed to understand the issues specifically ruled upon by the Court of Appeals.

Evidence as to the South Bend Antitrust Case.

The theory which plaintiffs urge upon this Court is that the indictment and the judgment were properly received in evidence and constituted proof that the defendants committed *all acts* charged in the indictment —and this despite the unequivocal instruction to the jury in the South Bend case that "it is not essential to that conclusion (a finding of conspiracy) that each and

every one of the acts charged in the indictment shall be proved." (R. 8536.)*

In the instant case, plaintiffs told the jury that defendants

> "were found to be and were adjudged guilty on November 17, 1939 of all the matters and things charged in said indictment in South Bend." (R. 235.)

That the indictment was before the jury as proof of the commission of every act alleged in the indictment was reiterated many times and reemphasized in final argument (R. 7073):

> "All the unreasonable restraints on the dealers have clearly been established here by the direct testimony of the dealer witnesses, and proof of the conviction of these defendants by the government in the South Bend indictment and trial on those exact charges."

And in closing summation counsel for plaintiffs accounted to the jury for failure to adduce evidence on various points by saying

> "As I pointed out before, the indictment was enough, or the conviction was enough." (R. 7378.)

The trial court refused to give instructions that the judgment was not evidence that any dealers had in fact been cancelled or that ~~any~~ particular act charged in the indictment had in fact been committed against plaintiffs or any particular person. See rejected instructions No. 13 (R. 9018) and No. 14 (R. 9019). Instead it intensified the prejudicial effect of the admission of the indictment and the arguments of plaintiffs' counsel by directing the jury that it might regard the judgment as evidence that every act charged in the indictment had been committed, and also that plaintiff's franchises were cancelled pursuant to

* On the appeal in the South Bend case, the Court of Appeals took the same view, stating that no "actual restraints nor overt acts need be proved" and that "it was not necessary for the government to show that a single dealer had in fact been discriminated against or coerced." 121 F. 2d 376, 405.

the conspiracy, stating (Instruction No. 12, R. 9101-9102) that for plaintiffs to recover they must prove by a preponderance of the evidence

> "*including the criminal judgment* that the defendants entered into a conspiracy * * * and that the franchise of Emich Motors Corporation was cancelled by reason of and pursuant to said conspiracy and not because of the things alleged by defendants as the reasons for such cancellation." (Italics ours.)

This instruction in terms gave effect to the judgment and the indictment as evidence in favor of plaintiffs on every issue in the case except the amount of damages.

Evidence as to Reasons for Cancellation of Plaintiff's Franchises.

The principal issue of fact in the trial court was the motive of General Motors Corporation (called GMC) in terminating Chevrolet franchises of plaintiff Emich Motors Corporation (called Emich Motors). Plaintiffs asserted that the terminations were effected with specific intent to carry out a conspiracy against Emich Motors because of its nonuse of GMAC. Defendants sought to show, and but for the rulings of the trial court would have shown, that nonuse of GMAC had no bearing upon the termination, and that the franchises were cancelled because Emich Motors had persisted over repeated objection from GMC in various kinds of misconduct, and because its activities in fleecing Chevrolet customers through fraudulent finance practices and failure to render proper service had brought not only the dealerships but Chevrolet and GMC into disrepute. The reasons for cancellation had been recorded at the time the decision to cancel was made. The grounds here relevant,* as specified in the formal "Requests for

* The opinion of the Court of Appeals did not discuss the errors involved in the exclusion of evidence relating to the other grounds specified. (R. 8899, 8905; Brief for Appellants, pp. 77-80.)

Cancellation" dated March 24, 1936, were as follows (Def. Exs. 288, 289, R. 6118, 8898-8902, 8903-8908):

> "1—Continues excessive finance packing on New and Used Cars from $12.00 to $25.00. Will not discontinue.
>
> "2—Large numbers of customer complaints on finance charge creating ill will toward General Motors Corporation and Chevrolet.
>
> "3—Will not organize to handle service resulting in large numbers of Service Complaints."

Plaintiffs' theory was that these stated grounds were mere pretexts, adopted not only to conceal but actually to further the objects of the conspiracy. (R. 269-274.) They were able to support this theory only because the trial judge consistently excluded evidence showing that the grounds did in fact exist, were known to defendants, and were the real reasons for the cancellations. The exclusion of this evidence was the more prejudicial because of the sharp conflict on virtually every point which the petition states as established fact, in many cases the conflict being between plaintiffs' witnesses' testimony during the trial and their prior sworn statements or their own books and records.*

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* The following are examples:

(1) *The claim as to withholding of cars.* Petitioners stress the claim that cars were deliberately withheld from dealerships because of failure to do business with GMAC (R. 1443-1445, 1450; Petn., pp. 34-35). However Emich's testimony to this effect was flatly contradicted, not only by other witnesses but also by testimony of Emich himself and Russell Loh, another officer and stockholder of plaintiffs, before the Federal Trade Commission in 1937. Loh there testified that he knew of no instance where any shipment had been deliberately held up (R. 4740). Emich testified that in spite of car shortages in all years including 1936, the year of the cancellation, he received enough cars (R. 6965). Furthermore, plaintiffs' own records demonstrate that except for the usual shortages at the beginning and end of model years they always had on hand a substantial number of cars and that in June, July and August of 1935, the time plaintiffs claim to have suffered from an acute shortage caused by deliberate withholding, they actually received in

It was these exclusionary rulings which the Court of Appeals found "deprived [defendants] of their right to a fair presentation of their defense" (Opinion below, R. 9469).

Excluded Evidence as to Excessive Finance Charges: Emich testified that he did not overcharge or "pack" finance charges (R. 1345, 1357); that there were no customer complaints against his finance charges (R. 1344); that plaintiffs had

> "financed over 200 automobiles where we did not charge the customer a penny for financing" (R. 1159).

He branded the statements in letters written by Chevrolet representatives objecting to his unscrupulous practices as deliberate falsehoods (R. 1320, 1328).

The trial court systematically excluded conclusive evidence that the first two grounds for cancellation existed and were the reasons for the cancellation of plaintiff's franchises—evidence squarely rebutting the whole of Emich's testimony. It reached this result by accepting plaintiffs' contention, now sharply repudiated by the Court of Appeals, that under that court's prior opinion in the criminal case plaintiff's financing practices were "none of General Motors' business" and it would be unlawful

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each month more cars than they sold. (Def. Ex. 213, R. 3632, 8715-8716; Def. Ex. 215, R. 3636, 8718-8719; Def. Ex. 216, R. 3639, 3642, 8721; Def. Ex. 295, R. 6727, 6730, 8915.)

(2) *The claim as to threats of reprisals for failure to use GMAC.* Plaintiffs also made much of an alleged series of picturesque threats by Chevrolet representatives to give them "the heat of hell" and cancel them if they did not use GMAC. Again, the claim was rebutted by testimony of other witnesses and directly contrary statements by Loh and Emich. Emich testified before the Federal Trade Commission that no one had ever threatened to cancel the dealership until he received the termination letter (R. 6944). Loh's deposition stated that he could not recall any threats by any representatives of Chevrolet or General Motors with respect to anything that might occur in the event GMAC was not given financing business (R. 2913).

for GMC to terminate dealerships because of overcharges to customers on financing (R. 3395). It carried this ruling to the extreme of excluding extracts from Emich's own records showing his actual practices (R. 3389-3405, 3443-3445, 3566-3572, 6570, 6972, 8691-8694, 8978-8989) and requiring defendants to delete from reports made in the regular course of business all references to excessive and fraudulent finance charges by plaintiffs. (Def. Ex. 274, R. 5614, 5615, 5670-5671, 8852; Def. Ex. 278, R. 5886-5888, 8872-8873; Def. Ex. 281, R. 6078-6079, 8887-8889; Def. Ex. 286, R. 6108-6109, 8893-8894.) And even where permitting the fact of a complaint to be introduced in evidence, the trial court excluded the vital evidence as to its substance and justification. (R. 4805-4807.)

The excluded evidence falls into three general categories:

(1) *Evidence as to the fraudulent character of plaintiffs' regular financing practices.* The following is illustrative. The court rejected an offer to prove by witness Stapleton, the former bookkeeper and office supervisor of the Emich dealerships, that all computations as to finance charges were brought to her to be checked, that Emich's instructions to her and to his salesmen were that they were to use a rate chart specially prepared and used only by EMC Finance, and that in addition to the charges shown on the chart they were to get as much more as they could; that the books of EMC Finance would show that in every financing of a new Chevrolet sale there was an "overage," the amount of which was not consistent but was whatever the salesman was able to get away with; that Emich had given instructions as to deceiving the customers in fixing the finance charges; and that plaintiffs regularly received complaints as to their finance charges,

and Emich had also instructed her to make false explanations thereof.*

(2) *Evidence of customer complaints as to overcharging and fraudulent misrepresentations concerning financing.* An example of this type of evidence is Defendants' Exhibit 304 *Iden.* (R. 4937, 4946, 8925), a letter of witness Hobday to Chevrolet stating that after he completed payments on a car purchased from and financed by Emich, he found that he had been overcharged by $50, that Emich admitted a $30 overcharge, and that upon threatening action through the Better Business Bureau and his attorney, he received a $25 settlement. It was excluded. (R. 4946.)

Witness Brellenthin, former district manager for Chevrolet, was allowed to testify only that he received numerous complaints and discussed them with Emich or his managers (R. 5319); he was not allowed to state that the complaints related to overcharges, or that plaintiffs had admitted the overcharges (R. 5315-5319).**

(3) *Evidence as to Chevrolet's knowledge of plaintiffs' practices and the complaints arising therefrom.* The court also excluded evidence that defendants knew of these excessive charges and the ill will to GMC thereby created from complaints received, examinations of plaintiff's books, and reports received in the ordinary course of defendants' business, and that this was one of the reasons for terminaing plaintiff's dealerships. (R. 6573, 6607-6608, 6672-6673, 6971, 6972, 8979-8980.)

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* Cross-examination of Emich on the same subject was prohibited by the trial court (R. 3387) and an offer to prove substantially the same matters through witness Loh, an officer and former manager of Emich Finance, was rejected (R. 3424-3425). Two tabulations taken from the books of Emich Finance and showing the actual packing were rejected. (R. 3402-3405, 3443-3445, 3566-3572, 6570, 6573, 6972, 8691-8694, 8978-8989.)

** Other employees of defendants were likewise prevented from testifying as to complaints they received and handled. (R. 4420, 4424-4425, 5620.)

The court even required the deletion of references to "overcharges" or "packing" from defendants' business records which were made prior to and which formed the basis for the termination. For example the court required that the italicized portion of the following paragraph be deleted from a Zone Manager's report to the General Sales Manager.

> "We have had numerous Customer complaints due to the type of merchandising methods pursued by this dealer, *and for your information we are attaching copy of a letter, which is a sample of the excessive overcharges on finance which is habitual, and is being done in connection with this dealer's own Finance Company.*"*

It was because of these exclusionary rulings that plaintiffs' counsel were enabled to argue to the jury that "an overcharge" was merely any rate differing from GMAC rates (R. 7149); that the objections to plaintiffs' financing practices were frivolous, and that

> "we have heard a lot of wild talk about finance charges and packs, excessive overcharges * * * but not from the mouth of anybody" (R. 7407);

and

> "there is not one iota of truth in it that Emich was actually packing finance charges" (R. 7385).

Evidence as to Poor Service and Service Complaints. Plaintiff's improper service and handling of service complaints was the third ground stated in the formal re-

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* Def. Ex. 281, R. 6078-6079, 8887-8889. Similar deletions were required in other documents which were a part of the record and on which GMC relied in arriving at the decision to terminate the dealerships. (Def. Exs. 273, 274, R. 5614-5615, 5670-5671, 8851-8852; Def. Ex. 278, R. 5886-5888, 8872-8880; Def. Ex. 286, R. 6108-6114, 8893-8894.)

quest for cancellation (supra, p. 7). Emich testified that Chevrolet's claim that his customer service was inadequate and the subject of many customer complaints was "rather ridiculous":

> "I gave instructions to the service manager to please everybody * * *";
>
> "we took care of them trying to build up good will." (R. 1157-1158.)

The court again excluded conclusive evidence supporting the third ground for cancellation and rebutting Emich's testimony. For example, the court ruled that a witness who had handled more than 200 service complaints, of which 60 were written, could not introduce the complaint letters unless the complainant was produced as a witness. (R. 4604-4609, 5068-5072.) A specimen of the letters excluded is Defendants' Exhibit 263 *Iden.*, a letter complaining of defective work of Emich's service department resulting in serious damage to the writer's car. Chevrolet had directed Emich to adjust the matter, but he had refused so to do. The letter so stated and concluded:

> "Shall I continue to curse them and blame you for permitting such people to misrepresent you, or can you or will you do something about it?" (R. 8831.)

The exhibit and the conversations between the Emich dealership and Morgan, the Chevrolet representative, concerning it were excluded. (R. 4611, 8830-8831.)

ARGUMENT.

We take up petitioners' contentions in the order of the headings in their petition.

I.

THE DECISION BELOW DID NOT TURN UPON A CONSTRUCTION OF SECTION 5 OF THE CLAYTON ACT.

The petition proceeds on the premises that the decision below erroneously construes Section 5 of the Clayton Act (38 Stat. 731, U. S. C., Tit. 15, Sec. 16), and that the ruling, unless reversed, is a precedent which will hamper the future enforcement of the antitrust laws. Neither premise is correct. The basic legal questions turned upon the application of well established legal principles to the unique record in the South Bend case and the instructions in the instant case.*

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* In an effort to make this case appear to be what it is not, counsel for plaintiffs have imagined other problems where none exist.

Plaintiffs state that the criminal judgment was admissible as evidence of defendants' "frame of mind" (Petn., p. 24), but no instruction was given or asked to the effect that such was the purpose of the judgment.

Plaintiffs state that "the criminal case was not multifarious" (Petn., p. 21), although no one ever contended otherwise. The indictment alleged only one conspiracy but the conspiracy had 26 possible terms. *United States* v. *General Motors Corporation*, 26 F. Supp. 353.

Plaintiffs state that the holding of the Court of Appeals deprives private litigants of all benefits of criminal judgments (Petn., pp. 2-3, 20, 21, 25-26) notwithstanding the ruling of the Court of Appeals that the criminal judgment was admissible as *prima facie* evidence of a conspiracy to violate the antitrust laws (R. 9454), and the fact that the reversal was based upon the peculiarities of the indictment and instructions in the criminal case (R. 9458-9459) and laid down no proposition of law of gen-

In the trial court plaintiffs contended, contrary to their position here (Petn., pp. 21-23), that Section 5 of the Clayton Act incorporated the doctrine of estoppel by judgment. Witness the following colloquy in connection with plaintiffs' offer of the record in the South Bend case:

> "Mr. Stickler (counsel for plaintiffs): Your Honor, this question, as we view it, arises under Title 15, U. S. C. A., Section 16 (Section 5 of the Clayton Act)
> • • •
> "First, it is the final judgment which is the matter establishing the prima facie evidence and, secondly, in determining what the final judgment creates prima facie proof of, you have to determine under rules applicable to the principles of estoppel by judgment what is behind that judgment." (R. 424.)

Plaintiffs also agreed, again contrary to their position here (Petn., pp. 16-19), that it was for the judge to determine the scope of the estoppel. Thus plaintiffs' counsel stated:

> "We do not say that the scope of estoppel is a question of fact for the jury. (R. 433.)
> • • • • •
> "I think it is the function of the court to look at the record and determine what the issues were that were decided [in the criminal case]." (R. 439.)

It was the subsequent abdication by the trial judge of this function and the misapplication of the doctrine of es-

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eral application in private suits for redress under the antitrust laws.

Plaintiffs state that Section 5 of the Clayton Act should be liberally construed (Petn., p. 15). In addition to being irrelevant, the statement is wrong. The statute being in derogation of the common law and also penal in character, must be strictly construed. *Greer, Mills & Co.* v. *Stoller*, 77 Fed. 1, 3; *American Banana Co.* v. *United Fruit Co.*, 153 Fed. 943, 944; *La Chappelle* v. *United Shoe Machinery Corporation*, 13 F. Supp. 939, 940; *Westor Theatres* v. *Warner Bros. Pictures*, 41 F. Supp. 757; *Scharfeld* v. *Richardson*, 133 F. 2d 340, 341; *Kordel* v. *United States*, 335 U. S. 345, 348-349.

toppel by judgment to the unusual record in the South Bend case which was one of the bases for reversal of the decision below.

The indictment in the South Bend case (Pl. Ex. 6, R. 325-326, 7479-7494), rather than containing a simple factual charge of conspiracy, had been construed in that case as stating a charge of conspiracy with some 26 terms. *United States* v. *General Motors Corporation*, 26 F. Supp. 353, 355. The judge unequivocally instructed the jury in the South Bend case that they need not find all of the terms charged to hold the defendants guilty. (R. 8536.) The general verdict of guilty therefore did not determine which of the several alleged terms of conspiracy actually existed, since a general verdict of guilty finds only the presence of such elements as are indispensable to the conviction.*

Furthermore, only two of the 26 possible terms alleged in the indictment have any relevance here. These were the allegations in paragraphs 41 and 42 of agreements to cancel dealers and to withhold cars from dealers. The other terms alleged are completely foreign to the claims for damages which plaintiffs have asserted and involve such items as alleged agreements to pay reserves out of finance charges (paragraphs 60-62), to give special privileges to dealers financing through GMAC (paragraph 50), to collect information on financing (paragraphs 44-47), and to require dealers to advertise GMAC (paragraph 58). The

* A general verdict of guilty finds the presence of all the essential ingredients of the crime charged and not the existence of every matter which was properly alleged. *Massey* v. *United States*, 281 Fed. 293, 298; *Licata* v. *State*, 81 Fla. 649, 88 So. 621, 622. Under the instructions given the jury in the criminal case, a finding of the existence of all of the terms or of any particular term of the conspiracy was not essential to the conviction (R. 8536). The case of *Rhoads* v. *City of Metropolis*, 144 Ill. 580, cited on page 24 of the petition, has been overruled. *The People* v. *C. & E. I. Ry. Co.*, 336 Ill. 506; *The People* v. *Wyanet Light Co.*, 306 Ill. 377.

judgment of conviction clearly did not determine that the conspiracy of which defendants were found guilty included the particular two of the 26 possible terms of the conspiracy. Defendants therefore contended in the trial court (and in the Court of Appeals) that the certainty necessary for estoppel by judgment was lacking (citing *Russell* v. *Place*, 94 U. S. 606; *Packet Company* v. *Sickles*, 5 Wall. (72 U. S.) 580; *De Sollar* v. *Hanscome*, 158 U. S. 216) and that the South Bend judgment did not constitute an estoppel as to, and was not relevant as to, any issue here (R. 113, 217-232, 325; App. Main Br., pp. 84-90; App. Reply Br., pp. 29-31). Both the trial court and the Court of Appeals disagreed with this contention and held the judgment admissible as *prima facie* evidence of "a violation by defendants of the antitrust laws of the United States." (R. 114, 9454.)

However, the trial court went further, and (1) sent the indictment to the jury as an exhibit without any limitation as to its use (R. 326-327, 7446-7447); and (2) permitted argument by plaintiffs' counsel that the judgment and indictment were proof of all matters therein alleged (*supra*, p. 5); and (3) instructed the jury that the judgment and indictment were not only evidence of a violation by defendants of the antitrust laws, but also (a) evidence of a conspiracy to cancel Chevrolet dealers, and (b) evidence that plaintiff's dealerships were cancelled pursuant to the conspiracy. (Instruction 12, R. 9101-9102; 7440.)

Since the question of what issues were determined by the judgment was one of law to be decided by the court, and not by the jury,* permitting the jury to consider the

* Contrary to petitioners' present claim in this Court (Petn., pp. 16, 19), the determination of the scope of a judgment is a question of law for the determination of the court, except when, as was not the situation here, extrinsic evidence *dehors* the record of the prior litigation must be resorted to in determining the scope of the adjudication. See 30 Am. Jur. (Judgments), Sec. 275, page 994; *Holbrook* v. *Quinlan & Co.*, 84 Vt. 411, 80 Atl. 339; 2 Black

indictment itself as evidence was manifestly improper. The Court of Appeals further found that the error was not cured but in fact aggravated by instructions allowing the jury to consider the judgment not only as evidence of a conspiracy but also as evidence that plaintiff's franchises were cancelled pursuant to the conspiracy, thus giving it evidentiary value far beyond its meaning, in the light of the character of the indictment and the instructions to the jury in the South Bend case.* (R. 9455-9456.)

The present professed anxiety of plaintiffs over the future enforcement of the antitrust laws, in the light of the decision of the Court of Appeals in this case, is totally without foundation in the record. Defendants frankly admitted in both the trial court (R. 218, 434, 7050) and in the Court of Appeals (App. Main Br., p. 89, and Reply of Appellants to Supplemental Brief of Appellees, pp. 5-7) that their objections to the use of the criminal judgment were based solely upon the unique character of the indictment and instructions in the criminal case and would have no application in the usual private antitrust action.**

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on Judgments (2nd ed.), Sec. 631; 2 Freeman on Judgments, Sec. 767; *Bishop* v. *Dodge*, 196 Mich. 231, 161 N. W. 1002.

*Plaintiffs state that the decision below is in conflict with the holding of this Court in *Local 167* v. *United States*, 291 U. S. 293, 298, 299 (Petn., p. 23). The issue in the instant case was not there involved and could not arise due to the basic differences in the indictments. In the *Local 167* case the terms of the conspiracy were alleged in the accusatory paragraph. Subsequent paragraphs alleged "means and methods". In the equity suit which followed the criminal prosecution denials by the convicted defendants of the alleged means and methods were stricken "not upon the ground that the facts therein alleged had been adjudicated against them, but upon the ground that the only allegations of the petition material" as to them related to the continuation of the conspiracy. (Government's Br. in that case, pp. 48 and 49.)

** If the accusatory paragraph of the indictment, rather than being in the language of the statute, had alleged a specific type of restraint as is the normal procedure, the judgment would have been available to plaintiffs under the statute, provided the partic-

II.

THIS WAS NOT A CASE OF PRICE FIXING.

Plaintiffs' present claim that the case or the Court of Appeals decision in any way involved or related to price-fixing was not made in the District Court or in the Court of Appeals until plaintiffs' petition for rehearing, is patently an afterthought, and is completely refuted by the record.

Neither party offered any evidence during the trial to show the delivered prices at which plaintiff or any other dealer sold automobiles, either on a cash or installment basis, nor were delivered prices even in issue.*

There is of course no reference to price-fixing in the opinion of the Court of Appeals since that issue did not arise on the record and was not argued. Indeed, the irrelevance of the record references cited by petitioners so demonstrates.**

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ular type of restraint was relevant to their case, such as a charge of a conspiracy to allocate customers. The same would have been true if the Government action had been in equity and had resulted in a decree which found and adjudicated as unlawful a specified course of conduct. See *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 295 Fed. 98, and *William H. Rankin Co.* v. *Associated Bill Posters of U. S.*, 42 F. 2d 152.

* The same is true of the South Bend case (R. 1857 in that case).

** The references cited for the proposition that failure to sell at the advertised price would result in the dealer's cancellation (Petn., p. 27) show nothing more than the provisions in the dealer's franchise relating to development of territory, maintenance of salesroom, etc., and the notice required for cancellation by either party (R. 38, 42, 2938).

III.

THERE WAS NO NEGATIVE OR UNCORROBORATIVE TESTIMONY.

The petition contends that the Court of Appeals was wrong in finding "borderline error" in the exclusion of the testimony of dealers tendered by defendants to the effect that, although they did not use GMAC, they experienced no mistreatment (Petn., pp. 30-31).

Plaintiffs produced sixteen former dealers who testified that they were cancelled or otherwise mistreated by defendants because of their failure to use GMAC. (R. 355, 387, 414, 447, 474, 492, 535, 577, 628, 654, 681, 754, 778, 865, 869, 949.) As the Court of Appeals said (R. 9466):

> "* * * plaintiffs not only used this evidence to corroborate other evidence as to the conspiracy on which their case was bottomed; they also, by arguing the parallel, sought to use it as proof of the impact of the conspiracy on Emich."

In addition to denying categorically the evidence of these sixteen witnesses, defendants sought (1) to rebut the inferences from their testimony, and (2) to show the actual policy toward GMAC by offering the testimony of other dealers from the same areas.* Many of these dealers produced by defendants did not use GMAC; many owned their own finance companies, and none experienced any mistreatment (R. 1776, 2794, 2799, 2808, 2878, 2885, 2952, 2953, 4324, 4359, 4362, 4370, 4380, 4405, 6570, 6572, 6605, 6608, 6971, 8993, 9005).

The error of the trial court in excluding this dealer

* The statement (Petn., p. 30, Footnote 1) that Mr. Dean, Emich's dealer successor, was permitted to testify that he was a non-user of GMAC who was not subjected to the conspiracy is false. The testimony cited (R. 4699) was only to the effect that the witness was a shareholder of a bank. Testimony that Mr. Dean did not use GMAC was excluded. (R. 4705-4706.)

testimony was assigned by defendants on their appeal (R. 9156). As to this the Court of Appeals stated (R. 9467):

> "This evidence was excluded on the ground that it was negative. We do not quarrel with this ruling generally, although it does appear to us to be a borderline case—it is not clear to us why the evidence of sixteen dealers that they lost their franchises for failure to use GMAC should have any more probative value as to the issue of impact of the conspiracy on Emich than that of the same or any other number of other dealers that they did not use GMAC and did not lose their franchises."

Plaintiffs challenge this statement by arguing (1) that the testimony was negative, (2) that defendants did not offer sufficient dealers to prove their policy towards GMAC, and (3) that to receive the testimony would prolong the trial. (Petn., pp. 30-31.) The last ground is not a valid basis for excluding the testimony if it is relevant, since it was the plaintiffs who opened the door by pretending that their sixteen witnesses were fair examples of all dealers who did not use GMAC, and, in any event, it is improper to exclude relevant evidence on the ground that it may prolong the trial. 6 Wigmore on Evidence (3rd ed.), Sec. 1865, and cases there cited.

The second contention, that defendants did not offer sufficient witnesses, is contrary to the record. In addition to the witnesses who were produced in the courtroom, defendants made a formal written offer to produce a representative number of dealers from all sections of the country. (R. 8991.)

Likewise, the contention that the evidence was negative is unfounded. If the existence of a conspiracy and of the impact of that conspiracy on plaintiffs may be argued inferentially from the experiences of 16 out of 15,000 dealers, it follows, of necessity, that the non-existence of such

a conspiracy and the absence of such an impact may be inferred from the contrary experience of the other dealers who did not use GMAC, or of a representative number of them. Furthermore, the testimony was offered for the express purpose of affirmatively showing the policy of defendants with respect to a dealer's use or non-use of GMAC. (R. 6573.) Evidence of a state of mind (and *a fortiori* of a joint state of mind such as is involved in a charge of conspiracy) may be received in the form of the contemporaneous acts, utterances and writings of the actors whose state of mind is in issue. *Lawler* v. *Loewe*, 235 U. S. 522, 536; *Greater N. Y. Live Poultry Chamber of Commerce* v. *United States*, 47 F. (2d) 156, 159; 3 Wigmore on Evidence, Sec. 1729(2). See also *Worthington* v. *United States*, 64 F. 2d 936, 940.

Petitioners also attack the holding that the trial court erred in excluding certain evidence of plaintiff's *actual* fraudulent and cheating financing practices* since this evidence was not known to defendants at the time of the cancellation. (Petn., pp. 31-33.)

Here, as in the Court of Appeals, counsel for plaintiffs rely on cases** holding that hearsay evidence is not admissible under the exception to the hearsay rule relating to evidence of state of mind unless the hearsay evidence is known to and relied upon by the person whose state of mind is in question. (Appellees' Brief, p. 75; Petn., p. 32.) Inasmuch as the evidence in question was not hearsay (R. 5031, 6570, 8978), those cases are not relevant.

The same is true of *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 273 U. S. 359, and *May* v. *United States*, 175 F. 2d 994, likewise relied on by plaintiffs in the Court of Appeals and here. In the *May case* the

* For a description of this evidence see *supra*, pages 9 and 10.

** *Goldstein* v. *United States*, 63 F. 2d 609, 616; *Medicine Co.* v. *United States*, 253 Fed. 694, 697; *Harrison* v. *United States*, 200 Fed. 662.

charge was that the defendant Congressman had accepted private compensation for services rendered in a matter in which the United States was interested. The services consisted of the defendant's request to the Ordnance Department to correct a discrimination against the Garssons. Evidence that the discrimination in fact existed was excluded since the acceptance of the compensation for the services was a crime regardless of whether the discrimination was "actual" or "groundless." (*Id.*, p. 1009.) The *Eastman case* held only that it was not error to refuse to instruct the jury that matters not known to defendant justified its conduct. In the instant case, however, defendants were not offering the excluded evidence for this purpose, but to show that defendants' belief that plaintiffs were engaging in fraudulent financing practices—which claimed belief plaintiffs ridiculed as a pretext—was in fact well warranted, and to rebut Emich's testimony that his actual practices were above reproach (R. 8979). It was therefore admissible under well established principles of law. *Holmes* v. *Goldsmith*, 147 U. S. 150, 164; *Williamson* v. *United States*, 207 U. S. 425, 451; *The People* v. *Jeffers*, 372 Ill. 590, 595. The evidence was also relevant and admissible on the subject of damages, as having a direct bearing on the alleged good will of plaintiffs. *Burke* v. *Canfield*, 121 F. 2d 877; *Washburn* v. *National Wall-Paper Co.*, 81 Fed. 17; *Ruud Mfg. Co.* v. *Commissioner of Internal Revenue*, 45 F. 2d 62, and was likewise offered on this question (R. 2474, 2915, 2916, 2919, 3329, 4938-4939).

Counsel for plaintiffs recognized not only the materiality of this evidence but its controlling effect when they pleaded against its admission on the ground that

> "you are going to rule us out of court if you make that ruling." (R. 4802.)

IV.

THE COURT DID NOT DEPART FROM REVIEW PRINCIPLES.

The petition also urges the granting of the writ on the ground that "the abandonment by the court below of rudimentary principles of appellate review requires the exercise of this Court's supervisory powers." (Petn., pp. 33-43.)

These alleged instances of abandonment of "rudimentary principles" are:

1. That the Court of Appeals did not consider evidentiary rulings in the light of the evidence in the record and particularly in the light of
   (a) Evidence of defendants' conspiratorial frame of mind.
   (b) Evidence of the dishonesty of defendants and their counsel.
   (c) The cumulative nature of excluded evidence.
2. That in holding certain evidence admissible the court ignored the fact that it was not credible.
3. That the court misstated the record.
4. That the court did not deal separately with each item of excluded evidence.

These supposed departures from review principles will be dealt with in the foregoing order.

Review in the Light of the Record.

The detailed and comprehensive opinion by Judge Kerner gives every impression of being the result of an exceedingly conscientious study of the record, indeed just such a study as the opinion states was made (R. 9469):

> "We have given the record, consisting of over nine thousand printed pages, and the exhaustive briefs of counsel much time and serious thought, * * *."

The discussion in the petition of the supposed conspiratorial frame of mind might be proper if the question on review had been the sufficiency of the evidence of conspiracy to support the verdict. That was not the question since, if admissible, the criminal judgment was *prima facie* evidence of the conspiracy and therefore adequate to sustain the jury's finding on that point, and if inadmissible or misused its use was prejudicial error necessitating reversal.

Likewise the various charges of misconduct upon the part of the defendants and their counsel (Petn., pp. 33-38) which, if true, might be the basis for contempt citations or disbarment proceedings, would not be the basis for denying the substantive rights of the parties. The absence of disciplinary action suggests that both the trial court and the Court of Appeals considered these charges to be groundless. Indeed, whenever such charges were made in the trial court, counsel for plaintiffs were promptly rebuked (R. 4987-4988, 5034, 6730, 3733).

Plaintiffs' contention that excluded evidence with respect to service and finance complaints was cumulative was fully argued in the Court of Appeals (Appellees' Br., pp. 52-55, 102-105) and their erroneous record citations and argument fully answered in appellants' reply brief (pp. 7-10, 17-18). It is obvious that admission of fragmentary and emasculated testimony on these points did not cure the error or obviate the prejudice resulting from rejection of the evidence summarized *supra*, pages 8 to 11. And after going to the jury on the theory that there was "not one iota of truth in it that Mr. Emich was actually packing finance charges" (R. 7385-7386) and that there was a total absence of evidence to show any mistreatment of Emich's customers in the matter of service (R. 7413), plaintiffs are hardly in a position to complain that the Court of Appeals was in error in finding the exclusion of this conclusive evidence to be erroneous.

Offers Alleged to Be Not Credible.

Attack is made on the rulings of the Court of Appeals regarding the admissibility of Defendants' Exhibit 173 *Iden.* and related offers on the ground that they were dishonest and spurious (Petn., pp. 38-41). Similar charges were made in the trial court and rejected. After the presentation of extensive offers of proof with reference to Emich's former bookkeeper, the following colloquy occurred (R. 5034):

> "The Court: Well, is there an objection to this new offer?
>
> "Mr. Stickler (counsel for plaintiffs): Yes, I object to it on the ground that [it] is a sheer invention of counsel, and I think for the Court's information that it would be desirable to have the offer of proof made outside of the presence of the jury to see whether the witness would say anything that would remotely resemble the inventive and imaginative and invective offers of counsel when he makes these offers of proof.
>
> "Mr. Strachan (counsel for defendants): Your Honor, I do not want to stand on false dignity. I do not think there is any foundation for counsel to say I have invented anything.
>
> "The Court: I do not either. If this is an offer, I am accepting it. I am sustaining the objection on other grounds, for the same reason that the Court has ruled with relation to finance charges, so the objection is sustained."

The rulings of the trial court were not predicated upon any doubt as to the good faith in which the defendants made these offers (R. 3401, 3405, 3443-3445, 3566-3572, 5030-5036).

Plaintiffs cannot defend the exclusion of Defendants' Exhibit 173 *Iden.* by asserting computations in that exhibit to be inaccurate. Such objections go only to the weight, not to the admissibility, of the exhibit. *Connecti-*

cut Importing Co. v. *Frankfort Distilleries*, 101 F. 2d 79, 81 (C. C. A. 2, 1939). Moreover, defendants offered to prove the accuracy of every detail of the exhibit (R. 3402-3404, 8979-8988). Their offer having been rejected, they must be presumed to be able to prove what they offered to prove. *Tilley* v. *County of Cook*, 103 U. S. 155, 163 (1880); *Scotland County* v. *Hill*, 112 U. S. 183, 186 (1884).

Supposed Misstatements of Record.

Petitioners state that the court below made the erroneous assumption that some sixty complaint letters were excluded when no such ruling was made. Petitioners further charge that the court distorted the sense of a statement of plaintiffs' counsel, "You are going to rule us out of court if you make that ruling".

As to the complaint letters, the record shows that the witness Morgan testified that sixty of the more than 200 service complaints against Emich that he had personally handled were in writing and that he had the complaint letters with him at the time of his testimony (R. 4602-4603, 4613-4614). Counsel for defendants attempted to examine the witness regarding these letters but was prevented from doing so by the trial court on the objection of the plaintiffs. The court was expressly advised that only two of the letters were being formally identified and offered as that was sufficient to protect the record (R. 5071). That this is enough is shown by the ruling of this Court in *McCandless* v. *United States*, 298 U. S. 342, where the Court said (p. 347):

> "The action of the trial court in rejecting the offers plainly meant that it would be useless to offer further evidence supplementing and dependent upon that which had been rejected. Faced with that ruling and implication, counsel was not required to offer further evidence along that line."

The charge that the court below distorted the statement of plaintiffs' counsel to the effect that to permit the defendants to show the numerous customer complaints regarding unscrupulous financing would rule the plaintiffs out of court is without substance. The remark was made in reference to evidence on a vital issue (R. 4798-4802).

Separate Consideration of Each Erroneous Ruling.

Apparently the position of plaintiffs is that the Court of Appeals had the duty of dealing in its opinion with each item of evidence that was erroneously excluded regardless of its similarity to other evidence that is discussed. Thus, although all letters from customers complaining about poor service were erroneously excluded by the trial court on the ground that they were hearsay, the plaintiffs contend that the Court of Appeals should have made its ruling with respect to each one individually rather than grouping them (Petn., p. 42).

The mere fact that it was unnecessary for defendants to identify and offer all of the letters after the pattern of rulings had been determined by the trial court (*McCandless* v. *United States*, 298 U. S. 342, 347, *supra*, p. 26) demonstrates the fallacy of the contention.

The trial court laid down certain rules resulting in excluding whole categories of evidence, which rules were found by the Court of Appeals to be erroneous. By pointing out the errors the court performed its function and nothing would be gained by a laborious and repetitious treatment of each separate item of excluded evidence.

V.

THE TESTIMONY AS TO DAMAGES WAS SPECULATIVE AND CONJECTURAL.

The charge in the petition that "the Court of Appeals selected this extraordinary case for the revival of obsolete concepts of the degree of 'certainty' required in the proof of damages" (Petn., p. 11) and that the court disregarded the decision in *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 567 (Petn., p. 43), misinterprets both the holding below and the basis for that holding.

The amounts of the verdicts were derived entirely from opinion testimony given by Lynch, an accountant, in large part based upon speculation by Emich. The major items in Lynch's estimates were loss of profits and of goodwill. (R. 1499, 1502; 1485, 1488.) In making his estimates Lynch committed the following major errors, all of which were reflected in the verdicts:

1. Improperly duplicated the alternative items of damages of loss of goodwill* and loss of prospective profits, which error the trial court endorsed by permitting the jury to cumulate these duplicate claims (R. 1556-1557; 7444).

2. Based his estimates of lost profits on Emich's speculation which admittedly was only from his "heart" and his "mind" (R. 1457).**

3. Estimated loss of profits on the erroneous assump-

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* Goodwill is the present value of prospective profits (R. 1556); *Mills* v. *Rich*, 249 Mich. 489, 229 N. W. 462, 463; *Jacob* v. *Miner*, 67 Ariz. 109, 191 P. (2d) 734, 741; *In re Borden's Estate*, 95 Misc. 443, 159 N. Y. S. 346, 348; *Ft. Pitt Gas Co.* v. *Evansville Contract Co.*, 123 Fed. 62, 64.

** Lynch ignored Emich's admission before the Federal Trade Commission that he had always received all of the cars he needed (R. 6965), and other conflicting evidence from plaintiff's own records. (*Supra*, p. 7.)

tion that there would be no expenses for managerial compensation. See *Wells* v. *National Life Ass'n*, 99 Fed. 222; *Kalin* v. *1855-81st Corporation*, 24 N. Y. S. (2d) 357; 15 Am. Jur. (Damages), Sec. 158 (p. 576).

4. Estimated lost goodwill of both plaintiffs on the erroneous theory that the "average earnings" to be capitalized should be determined without any deduction for managerial compensation or income taxes (R. 1532-1533, 1545, 1552, 1581-1583). See *Sanderson* v. *Commissioner of Internal Revenue*, 42 F. 2d 160, 161; *Edwin Schiele Distilling Co.*, 3 B. T. A. 873; *Robert Thal, et al.*, 13 B. T. A. 1229. Proper deduction for managerial compensation alone would have negatived any goodwill for either plaintiff (R. 1582-1583).

5. In capitalizing the improperly inflated "average earnings", used arbitrary and admittedly unprecedented percentage factors which more than doubled the resulting claimed goodwill.* (R. 1535.)

6. Made his computations from books authenticated by neither a competent accountant nor by one having the books under his supervision or knowing the manner in which they were kept. Lynch made no audit (R. 1509-1512) but relied on Emich who admitted he had nothing to do with the books (R. 1203).

It was the combination of these errors that made the resulting estimates purely conjectural and compelled the court below to conclude (R. 9468):

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* Lynch assumed a normal return on average tangible assets of 7½% and capitalized the excess earnings at 10% (multiplying by ten) rather than the standard percentages of a normal return of 10% and a capitalization of the excess earnings at 20% (multiplying by five). Appeals and Review Memorandum 34, II Cum. Bull. 31 (1920); cf. *S. Leigh Savidge*, Prentice-Hall, Tax Ct. Memo Dec., Par. 45180. The compound result of the errors was claimed loss of goodwill for the two companies of $175,000, or approximately forty times their actual average net earnings (Def. Ex. 209, R. 3604, 8711; Def. Ex. 223, R. 3678-3679, 8733).

"* * * it seems to us that here, the evidence submitted by plaintiffs as to the issue of damages was so extremely speculative and conjectural as to furnish no sound basis for the amount allowed."

CONCLUSION.

The decision below does no more than apply established principles of law to the facts before the Court. It does not conflict with any decision of this Court or any Court of Appeals; on the contrary, on principle and authority no other decision could have been reached. The sound analysis of the questions presented in the exhaustive opinion of the Court of Appeals makes unnecessary a second consideration of the issues here.

Respectfully submitted,

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